

In the Matter of Merchant Mariner's Document No. Z-696612-D2
Issued to: JAMES RICHARD BELL

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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JAMES RICHARD BELL

This appeal comes before me by virtue of Title 46 United States Code 239(g) and 46 Code of Federal Regulations Sec. 137.11-1.

On 2 December, 1949, an Examiner of the United Coast Guard at New York City revoked Merchant Mariner's Document No. Z-696612-D2 issued to James Richard Bell upon finding him guilty of "misconduct" based upon a specification alleging in substance, that while serving as a porter on board the American S. S. EXOCHORDA, under authority of the document above described, on or about 18 November, 1949, he wrongfully had in his possession 115 grains of hashish while said ship was in the port of New York.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Although advised of his right to be represented by counsel of his own selection, he elected to waive that right and act as his own counsel. He entered a plea of "guilty" to the charge and specification but his plea was changed to "not guilty" by the Examiner since Appellant displayed some doubt as to the meaning of the word "possession" as used in the specification.

Thereupon, the Investigating Officer introduced in evidence the testimony of the Customs Patrol Officer who had apprehended Appellant and the Custom's chemist who had analyzed the substance found in Appellant's possession.

In defense, Appellant testified under oath in his own behalf. He stated that he had been given the hashish by a man in Marseilles in exchange for a shirt.

At the conclusion of the hearing, having heard the argument of the Appellant, the Examiner found the charge "proved" by proof of the specification and entered an order revoking Appellant's Merchant Mariner's Document Z-696612-D2 and all other valid documents issued to him by the U. S. Coast Guard and predecessor authority.

From that order, this appeal has been taken, and it is urged:

Point 1: That there was no evidence identifying the substance tested and found to be hashish as the identical substance found in the possession of Appellant;

Point 2: There was no proof that Appellant knew the substance found on him was hashish.

APPEARANCES: Samuel Segal of New York

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

On 18 November, 1949, Appellant was serving as a porter on board the American S. S. EXOCHORDA, acting under authority of his Merchant Marine Document No. Z-696612-D2, while the ship was berthed at Jersey City, New Jersey.

On this date during a routine search of the ship, several small pieces of a brown caked substance were found in Appellant's watch pocket when he was searched by a Customs Officer. Subsequent analysis disclosed that this substance was 115 grains of hashish, a marijuana derivative.

There is no record of any prior disciplinary action having been taken by the Coast Guard against Appellant during his four years at sea. He is single and 22 or 23 years of age.

OPINION

Appellant states that there is no evidence to establish the fact that the substance determined to be hashish was the same substance as that which was found in Appellant's watch pocket when he was searched by the Customs Officer on board the EXOCHORDA. It is contended that there are two missing links in arriving at this conclusion: First, the Customs Officer who searched Appellant and found the substance in his pocket had no personal knowledge that this was the same substance which was put in an envelope and later analyzed; and second assuming the substance taken from Appellant was put in an envelope by the arresting officer, there is no evidence that the substance found to be hashish came out of this same envelope.

The testimony of the Customs Officer definitely established the fact that he personally knew the substance put in the envelope was the same as that which was found on Appellant's person. Appellant lays great emphasis on the statement by the Customs Officer that "We put it in an envelope" and concludes that, since he used the pronoun "we" instead of "I" then other persons had put it in the envelope. This seems to be a very strained interpretation since the officer implied his presence by use of the pronoun "we" rather than "they", and particularly in view of his answers to subsequent questions which indicate that he sealed the envelope and kept it in his possession until he took it to the office. Appellant objects to the consideration of the latter evidence because it was obtained in answer to leading questions. But I think it may properly be used to the extent of corroborating the Customs Officer's above quoted statement.

A chemist for the U.S. Customs Laboratory of New York testified that three days after this seizure by Officer Friedman, he analyzed the contents of an envelope labelled as having been

"seized from J.R. Bell, porter on the S. S. EXOCHORDA by P. P. O., Port Patrol Officer, Friedman 7071." (R.13) The envelope was found to contain 115 grains of caked hashish "in two or three pieces." (R. 16) This agrees with the Customs Officer's testimony that it was in "several caked pieces" (R.11) and Appellant's statement that "it broke up in three small pieces." (R.24) This seems to conclusively identify the substance found in Appellant's possession with the substance found by analysis to be hashish.

The other point raised by Appellant is that he did not know that the substance given to him was hashish and there is no proof to the contrary. It is urged that the decision of the Examiner is based upon the assumption that Appellant should have known that he was given hashish by the man in Marseilles but that there is no evidence in the record to justify this assumption; and that there must be a conscious, knowing possession, as opposed to mere possession, for it to be wrongful and unlawful. It is pointed out that the man did not tell Appellant the nature of the substance, other than that it would help him in his love-making; and that Appellant had ample time to have gotten rid of it before the Customs Officer searched him. Hence, it is argued that the Investigating Officer completely failed to adduce proof that Appellant knew the substance was hashish.

The gist of Appellant's testimony is that when the ship came into Marseilles at about 0900 on 8 November, 1949, he was on deck and started a conversation with a man on the dock. Appellant agreed to go ashore with the man at 1130 to see a girl. At 1130, Appellant met the man and as they were walking away from the dock the man showed him some liquid in a little bottle and said he wanted to give it to Appellant because it would help him with girls. Appellant rejected it because he was curious about what he drank. Then the stranger pulled the caked hashish out of his pocket and told Appellant the same thing about it as had been said about the liquid. Appellant accepted it without any further explanation or questions as to what it was. (R. 21) The man was smoking a cigarette said to have been made of the same substance he had given Appellant ("He was smoking it" - R.21); and Appellant took a "drag" on the cigarette. He stated the cigarette was strong (R. 21); that it strangled him (R. 18) and made him cough (R. 21); and that he shook his head and handed the cigarette back to the man but retained the piece of hashish he had already put in his pocket. (R.21) This took place after they had walked about two blocks from the ship. Appellant said he then left the stranger because he had to be back on board to work at 1300; and, as he came back to the ship, he gave the man a shirt. (R. 18) Appellant did not discuss or mention this incident to any of the crew members (R. 22) but he kept the article in his coat pocket until he put it in his pants pocket when the ship arrived at Boston. (R. 18). When Appellant was searched by the Customs Officer, the latter ordered Appellant to take out all his money "and different things." (R. 18). The hashish was not taken out but was discovered only when the officer "ran his hand in my watch pocket." (R. 18).

The question as to what constitutes "wrongful" or "unlawful" possession of marijuana and other narcotics and drugs has come before me on numerous occasions in the past. The evidence establishes to my satisfaction that the commodity found in the watch pocket of the trousers worn by Appellant at the time of search was hashish - a derivative of marijuana. Under certain provisions of law, mere physical possession becomes ipso facto illegal and unlawful.

But the charge here is that Appellant "wrongfully" possessed a certain commodity - viz., hashish. Appellant testified that he was told, he believed and he acquired the substance solely because, and with the full expectation that, its use would serve him some questionable purpose of doubtful morality.

In view of the quality of Appellant's testimony, it is my opinion that the Examiner was justified in finding that the prima facie presumption of knowledge, made out against Appellant by proof of possession, was not overcome by Appellant's denial that he knew it was hashish which had been given to him. Although his testimony was not contradicted by direct evidence, it was so evasive and improbable that the Examiner evidently gave it little or no weight in his evaluation of all the evidence in the case.

Although he denied that he knew it was hashish, he did not give a responsive answer at either time he was asked what he thought it was. (R. 21). Once he answered that he didn't know what it was; and the next time, when asked what he thought it was when he took a "drag" on the cigarette, he replied, "What did I think." It does not seem probable that Appellant would have agreed to leave the ship at 1130 to go see a girl and then decide that he didn't have time to do that and therefore returned to the ship a few minutes after leaving even though he had a full hour and a half to spare.

Nor does it seem likely that he would give a shirt to a total stranger for a small piece of a caked substance, without asking any questions as to what it was, unless he had a fairly good idea as to the nature of the substance. This would seem particularly improbable since Appellant stated that he gave the man a shirt after he had "strangled" on a "drag" from a cigarette made of the same stuff. And his failure to mention it to his shipmates or to attempt to later find out what he had been given, coupled with the fact that he did not remove it from his pocket upon orders from the Customs Officer, strongly indicate the improbability that he did not have "any thoughts **** at all" (R. 21) as to what it was.

Since Appellant's denial was rejected, the presumption of knowledge was a sufficient basis for the Examiner to find that Appellant knew the substance in his possession was hashish, or at least, some other substance which might not be unqualifiedly admitted into the United States.

Even if Appellant's denial had been considered sufficient to offset the prima facie presumption, the inferences drawn from the surrounding circumstances would be adequate to establish that Appellant knew he had some prohibited drug in his possession. The facts that Appellant was first given the substance, then was asked to smoke a cigarette made of the same substance, and after doing so he gave the man a shirt, certainly are sufficient to infer that the "drag" on the cigarette was used as a selling point to get Appellant to give something of value in return for the substance and that Appellant must have attached value to the substance as a drug; otherwise, he would not have given a shirt in exchange for something that caused him to cough and strangle. The latter inference is supported by Appellant's secretive attitude towards his shipmates, the attempted concealment from the Customs Officer, and the complete absence of any inquiry as to what the substance was. In connection with such inferences, it was stated in the case of Lavender v. Kurn

(1946), 327 U.S. 645, 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

CONCLUSION

The conclusion of the Examiner that the charge and specification were "proved" must be sustained.

ORDER

The Order of the Examiner dated 2 December, 1949, should be and it is, AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C. this 27th day of June, 1950.